

**PUBLIC PROCUREMENT IN MALAYSIA: IS THERE A NEED  
FOR REFORM?  
A LOOK AT THE OBJECTIVES OF PUBLIC PROCUREMENT  
PRINCIPLES WITH PARTICULAR EMPHASIS ON  
TRANSPARENCY AND ACCOUNTABILITY**

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**1. Introduction**

What is public procurement and why the need for regulation? Public procurement is the process by which public authorities (governments) procure works, goods or services from companies. In the United States, government procurement is governed by statutes namely the United States Code and mentioned in Article One of the United States Constitution. In the EU, statistics provide that 15-20% of global GDP is taken up by public procurement and this is a substantial portion of the EU

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economy and the economies of many countries around the world.<sup>3</sup> Under the World Trade Organization's Agreement on Public Procurement (GPA), public procurement projects have been estimated at around 1.3 trillion Euros.

The irony is that while the EU itself opens its markets across borders, many non-EU member countries are reluctant to open their markets to international competition. However this has not deterred the EU from forging ahead with its focus on open markets. While continuing to collaborate with its own member countries and ensuring that public procurement sectors are compatible with the EU rules, the EU has continued holding dialogues with other countries having important public procurement sectors and negotiates with other countries in the framework of trade negotiations.

So now the question as to why there is such a focus on public procurement can be answered. Public procurement is the biggest spender in a developing economy. The very nature of procurement and the use of public funds in government procurement involves decision taking. Such decision taking would naturally be influenced by discretion. And discretion in turn may be influenced by biasness. Such would then open the door to risk of corruption. All levels of government departments engage in procurement. Important projects that encompass health, education and infrastructure have a significant impact on the economic development of a country. Developing nations with a challenged economy usually resort to boost economic growth by increased developmental projects. Sometimes, the projects do affect the provisions of services to the needy members of the public. In this regard, Malaysia, especially Kuala Lumpur, has embarked on a multi-billion Ringgit<sup>4</sup> transportation system, with the building of the

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<sup>3</sup> See Public Procurement, Available at [http://ec.europa.eu/growth/single-market/public-procurement/index\\_en.htm](http://ec.europa.eu/growth/single-market/public-procurement/index_en.htm). [Retrieved on February 25<sup>th</sup>, 2016].

<sup>4</sup> The 52.2km Sungai Buloh-Serdang-Putrajaya Mass Rapid Transit (MRT) Line 2 is likely to cost over RM30 billion, taking into account the private land acquisition that is estimated to be between RM4 billion and RM5 billion: Available at <http://www.themalaysianinsider.com/malaysia/article/mrt-says->

Light Rail Transport and the Mass Rapid Transport Corporation (MRT). Public procurement reform and regulation may result in better general governance and accountability benefiting suppliers as well as procurers and ultimately the end user, the public.

## 2. Development of public procurement regulation in different jurisdictions<sup>5</sup>

Regulation of public procurement is by no means a new phenomenon. It has been introduced into various jurisdictions<sup>6</sup> and may in fact be said to be reaching the “ripe old age” status in some countries. The number of countries that have public procurement laws or regulations number 25 in all.<sup>7</sup> The list is as follows: Albania (Public Procurement Law 2006); Bosnia & Herzegovina (Public Procurement Law 2004); Bangladesh (Public Procurement Regulations 2003); Bulgaria (Public Procurement Law 2003); Croatia (Public Procurement Law, 2007); Cyprus (Public Procurement Law 2003); Czech Republic (Act on Public Contracts 2006); Estonia (Public Procurement Law 2003); France (Code des marches publics 2006); Germany (Gesetz gegen Wettbewerbsbeschränkungen 2007); Ghana (Public Procurement Act 2003); Hungary (Act CXXIX of 2003 on Public Procurement amended 2007); Kenya (Public Procurement and Disposal Act 2005); Kosovo under UNSCR 1244/99 (Public Procurement Law 2007); Latvia (Law on Procurement for State or Local Government Needs 2002); Lithuania (Law on Public Procurement No X-471 2005); Former Yugoslav Republic of Macedonia (Public Procurement Law 2007); Malta (Maltese Public Contracts Regulations 2004); Mauritius (Public Procurement Act 2006); Montenegro (Public Procurement Law 2006); Nigeria (Public Procurement Act 2007); Poland (Public Procurement Law 2004);

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[line-2-to-cost-over-rm30-billion](#). [Retrieved on 20<sup>th</sup> February, 2016].

<sup>5</sup> Grace Xavier and Jason Chew, “Regulation of public procurement: General principles and guidelines with a brief overview of procurement principles governing the construction industry in Malaysia”, (2012) 28 Const. L.J. Issue 5, pp 28-48.

<sup>6</sup>[http://www.oecd.org/document/30/0,3343,en\\_33638100\\_33693506\\_35029086\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/30/0,3343,en_33638100_33693506_35029086_1_1_1_1,00.html): [Retrieved on August 13<sup>th</sup> 2010].

<sup>7</sup> As on 19.10.2010.

Romania (Law regarding the award of the Public Procurement Contracts, Public Works Concession Contracts and Services Concession Contracts 2006); Scotland (The Public Contracts (Scotland) Regulation 2006); Serbia (Public Procurement Law 2004); Slovak Republic (Act on Public Procurement 2005); Slovenia (Public Procurement Act ZJN-2 2006); Turkey (Public Procurement Law 2002) and the United Kingdom (The Public Contracts Regulations 2006 and the Utilities Contracts Regulation 2006). Other countries not mentioned in the list above have also come up with legislation governing public procurement and certain countries have had major amendments to their existing acts. Some of the said countries are Philippines (Government Procurement Reform Act 2002); Pakistan (Public Procurement Regulatory Authority Ordinance 2002); Uganda (Public Procurement and Disposal of Public Assets Act No. 1 of 2003); Venezuela (Public Procurement Act 2004); Zanzibar (The Public Procurement and Disposal of Public Assets Act 2005), Nepal (The Public Procurement Act, 2063 enacted in 2007); Zambia (Public Procurement Act (Commencement) Order 2008), Tanzania (The Public Procurement Act 2011); India (Public Procurement Bill 2012); Kenya (Public Procurement and Disposal Act 2015 - old Act was in 2005) and Trinidad (Public Procurement and Disposal of Public Property Act, 2015).

It appears that many jurisdictions have enacted their regulations or amended them in the 21<sup>st</sup> century. The reasons could be manifold, including the increase of knowledge of the public in procurement issues and the spread of procurement principles and accountability due to the dissemination of the subject of procurement by various academic bodies and government agencies. Whatever the reasons may be, it is patent that the need for some form of regulation has become perfunctory in Malaysia.

Many countries have adopted procurement regulations in the past decade.

The need for procurement guidelines cannot be emphasized or reiterated more in developing countries. The economic progress in a region continues to be the stimulus needed to boost the economic development of a country. Hence development projects need to be carried

out. But for the progress to be sustained, and for the country to become financially strong, the call for proper governance less pervaded by waste, inefficiency, secrecy and corruption is needed. There has to be in place a more competent and accountable government administration. Such can be evidence where public procurement focusses on value for money. Sadly, serious weaknesses have continually plagued developing nations, and this has caused the rise in reforms in the past 15 years.

### 3. Challenges faced

According to Jones<sup>8</sup> the major obstacle in achieving effective public procurement in most countries in Southeast Asia is legislative inertia. Countries like Malaysia have various fragmented instruments governing public procurement, but such instruments are far from efficient as instead of creating greater transparency in the procurement process, it only serves to cause inconsistency and thus leading to lack of accountability in procurement procedures. In the Public Spend Matters Europe<sup>9</sup> the author has listed out six challenges to public procurement regulation. He states the challenges as those with regard to difficulty in the implementation of new directives; austerity; social issues; value and innovation matters; the fight against corruption and capability and competence.

Terakawa Akira<sup>10</sup> on the other hand, has a different set of challenges: ensuring and improving the quality of public works; the role of construction industries in exhibiting local leadership; harmonizing with international public procurement processes and contributing to the creation of a recycling society. In

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<sup>8</sup> David S Jones, "Public Procurement in Southeast Asia: Challenge and Reform", Journal of Public Procurement, Vol. 7, Issue 1, pp. 3-33. Available at <http://unpcdc.org/media/6112/public%20procurement%20in%20southeast%20asia%20-%20challenge%20and%20reform.pdf> [Retrieved on March 7<sup>th</sup>, 2016].

<sup>9</sup> Available at <http://public.spendmatters.eu/2015/01/22/2015-challenges-for-public-procurement-austerity/> [Retrieved on March 10<sup>th</sup>, 2016].

<sup>10</sup> "Challenges facing public procurement and perspectives of national land management": Available at <http://www.nilim.go.jp/english/annual/annual2011/2-1.pdf> [Retrieved on March 10<sup>th</sup>, 2016].

South Africa<sup>11</sup>, some of the problems faced are lack of proper knowledge, skills and capacity of the procurement personnel. In addition they also found that there is inadequate planning and the linking of demand to the budget. Issues of accountability, fraud and corruption are also prevalent. Further issues include inadequate monitoring and evaluation of projects and unethical behaviour. However the common thread is the fight against corruption and lack of legislative will to ensure compliance with established directives.

Sulaiman Mahbob<sup>12</sup> emphasises that good governance and transparency are vital to propelling Malaysia's economy to a higher level. "Good governance plus transparency will definitely curb excesses such as possible corruption, rent-seeking activities and patronage".<sup>13</sup> Mahbob calls for adequate checks and balances to maintain the integrity of Malaysia's key institutions. Only then will corruption be addressed resulting in greater transparency and accountability which in turn will ensure that developmental outcomes are just.

#### 4. The UNCITRAL MODEL LAW OF 2011

##### A brief introduction

The UNCITRAL Model Law of Procurement (the 2011 Model Law) was adopted in July 2011. Its principles are aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity, fairness, participation and competition and integrity towards these goals. Transparency is also a key principle, allowing visible compliance with the

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<sup>11</sup> Intaher M Ambe and Johanna A Badenhurst-Weiss: "Procurement Challenges in the South African Public Sector". Available at <file:///C:/Users/John/Downloads/63-117-1-SM.pdf>. [Retrieved on March 10<sup>th</sup>, 2016].

<sup>12</sup> "Economist says Good Governance, Transparency vital for Malaysia's Economy": The Star online, January 8<sup>th</sup>, 2014: available at <http://www.thestar.com.my/business/business-news/2014/01/08/economist-says-good-governance-transparency-vital-for-economy/> [Retrieved on March 15<sup>th</sup>, 2016].

<sup>13</sup> As above.

procedures and principles to be confirmed. The 2011 Model Law replaces the earlier law that was enacted in 1994, known as the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. The purpose of the 2011 Model Law was in line with the desire of the Commission to ensure that new practices, particularly with respect to e-procurement, were incorporated as it reflected the growing trends. The fundamental tenets of the 1994 Model Law, however, remain unchanged.

This section will consider the salient provisions of the Model Law and its impact on procurement regulations that have been adopted in the particular nations. The main reason for the re-drafting of the UNCITRAL Model Law of 2011 appears to be to curtail fraud and corruption in the public procurement process.<sup>14</sup> Nicholas stated that in order to be effective and in line with United Nations Convention against Corruption (UNCAC) guidelines, the proposed amendments had to focus broadly on coming up with a coordinated anti-corruption action which in turn, focussed on the promotion of integrity and accountability. In order to achieve these objectives, there had to be clear preventive measures and sanctions bordering on criminalization to be imposed on the offenders. Other areas of focus would include asset recovery with the assistance of international cooperation, where such assets had been procured outside the national boundaries.

Under article 9<sup>15</sup> of the UNCAC, goals and objectives of procurement system requirements are those based on

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<sup>14</sup> Caroline Nicholas, "Fraud and Corruption in Public Procurement", (2010): Available at [https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2010-December-13-15/Presentations/Caroline\\_Nicholas\\_-\\_Public\\_Procurement\\_-\\_UNCITRAL.pdf](https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2010-December-13-15/Presentations/Caroline_Nicholas_-_Public_Procurement_-_UNCITRAL.pdf). [Retrieved on 20<sup>th</sup> February 2016].

<sup>15</sup> Article 9. Public procurement and management of public finances 1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia: (a) The public distribution of information relating to procurement

transparency, competition and objective criteria employed in decision-making which would be the ideal mechanism for combating corruption.

The key provisions of the 2011 Model Law may be summed up as follows:<sup>16</sup>

- **Recognising the growth of e-procurement and rewriting the framework agreements to reflect the change in procurement procedures.**

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procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders; (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed; (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements. 2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia: (a) Procedures for the adoption of the national budget; 13 (b) Timely reporting on revenue and expenditure; (c) A system of accounting and auditing standards and related oversight; (d) Effective and efficient systems of risk management and internal control; and (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph. 3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

<sup>16</sup> See the UNCITRAL Model Law on Public Procurement (2011): Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html). [Retrieved on March 2<sup>nd</sup>, 2016].



- Ensuring that value for money principle continues to be upheld
- Contains procedures to allow for different types of procurement<sup>17</sup>
- Ensures that the enacting State has still the freedom to pursue its domestic policy objectives e.g. promoting economic development through the support of SMEs<sup>18</sup>
- Support the harmonization of international standards in public procurement<sup>19</sup>
- Assist the States in formulating a modern procurement law.

Subsequently, after the 2011 Model Law was adopted, the Guide to Enactment of the UNCITRAL Model Law was formulated and adopted on 28<sup>th</sup> June 2012. The need for this Guide was necessary to provide the background and explanatory information on the policy considerations reflected in the 2011 Model Law. The Guide serves to explain both the objectives of the 2011 Model Law as well as to how the provisions are designed to achieve those objectives. The Guide will be an invaluable reference tool for policymakers and legislators, regulators and those providing guidance to users of a procurement system based on the Model Law. The Guide addresses policy issues and issues of implementation and use of the Model Law. User of the earlier 1994 Model Law will also benefit from the Guide as the Guide will help them to update their legislation to reflect the recent developments in the area of public procurement.

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<sup>17</sup> Different types of procurement would include standard procurement, urgent or emergency procurement, simple and low-value procurement, and large and complex projects. See the UNCITRAL Model Law on Public Procurement (2011): Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2011Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html). [Retrieved on March 2<sup>nd</sup>, 2016].

<sup>18</sup> However, such leeway must still adhere to international commitments that bind the member states.

<sup>19</sup> In this regard, the 2011 Model Law takes into consideration the relevant provisions of the WTO Agreement on Government Procurement, the European Union Directives, the UN Convention Against Corruption, the Procurement Guidelines and Consultant Guidelines of the World Bank and the equivalent document of other IFIs.

**5. Public Procurement in Malaysia – the guidelines and the various instruments**

Malaysia is a member of the Asia-Pacific Economic Co-operation Forum (APEC), participating actively in the Government Procurement Experts' Group (GPEG) and has adopted the APEC Non-Binding Principles on Government Procurement. In addition, Malaysia has signed the United Nations Convention Against Corruption (UNCAC). Although a member of the WTO, Malaysia steadfastly refused to become a party to the GPA.

Government Procurement Efforts are being implemented to improve transparency in government procurement. Malaysia is implementing an electronic procurement (eP) system in government agencies. The Treasury Instruction Letter on 28 June 2013 stipulates that Cost Responsibility Centres of government agencies are required to ensure that at least 75 per cent of their annual allocation of procurement is conducted online through the eP system. Malaysia still uses preferences in government procurement processes to benefit locally owned businesses. Generally, international tenders are invited only when local providers of goods and services are not available.<sup>20</sup>

The legal framework for public procurement in Malaysia is governed by several statutes and government instruments namely the Financial Procedure Act 1957, the Government Contract Act 1949, Treasury Instructions and Treasury Circular letters. These documents are used whenever the government enters into a procurement exercise. The Procurement Division of the Malaysian Government sets out the rules governing procurement in government projects. The department is headed by the Minister of Finance (at the Federal level) and by the Chief Ministers for the various state procurement boards.<sup>21</sup>

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<sup>20</sup> Available at

[http://www.apec.org/~media/Files/AboutUs/AchievementsBenefits/2014\\_BG\\_Reports/Malaysia%20-%20Bogor%20Goals%20Progress%20Report%20Oct2014.pdf](http://www.apec.org/~media/Files/AboutUs/AchievementsBenefits/2014_BG_Reports/Malaysia%20-%20Bogor%20Goals%20Progress%20Report%20Oct2014.pdf).  
[Retrieved on April 3<sup>rd</sup> 2016].

<sup>21</sup> Country Reports, ADB Report, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

The Government Procurement Management Division of the Ministry of Finance (MOF) is responsible for setting all the procurement procedures, both internally and outside of Malaysia. Regulations of public procurement is fragmented and are spread over several legal documents, namely the Financial Procedure Act 1957, the Government Contract Act 1949, Treasury Instructions, Treasury Circular Letters and Federal Central Contract Circulars, as of which are briefly discussed below:

- **Financial Procedure Act, 1957**

This Act permits authority and management of public finance in Malaysia. It highlights financial and accounting procedures including collection, custody, and payment of federal and of states' moneys; supplies, custody and disposal of public properties owned by state and federal governments. The act was amended in 1972, to authorize the Minister of Finance to manage, supervise, control and direct all federal financial matters.

- **Government Contract Act, 1949 (revised 1973)**

This Act authorizes the ministers to sign contracts and delegates authority to the respective officers to sign contracts on behalf of the government. It was revised in 1973 to complement the original Act enacted in 1949. One of the major amendments was its mandatory to get the authorization form filled-up and signed by the respective heads of ministries or heads of states.

- **Treasury Instructions (TIs)**

TIs provide details of financial and accounting procedures including procurement. Treasury instructions are issued to government agencies from time to time on any new changes to the procedures. To date there are 25

TIs issued to government agencies. It ranges from Estimated Revenue to Breakdown of Main Expenditure.

- Treasury Circular Letters (TCLs)

This official letter is issued by the Treasury Department to communicate, upgrade, explain, and amend the existing and new regulations or procedures regularly from time to time with the intention to make the public and the interest groups aware of any changes made. To date Treasury Malaysia had issued 24 new TCLs and reviews the tender board to ensure greater transparency in procurement transactions.

- Federal Central Contract Circulars (FCCCs)

This circular is issued with the intention to make it known to the public about the presence of central public procurement contract. It provides the following details including name, price, supplier, supply coverage, specification, mode and timeframe of the delivery.

These instruments apply to procurement by all federal and state governments and semi-governmental agencies but not state-owned enterprises. All of these identified the types of procurement and the processes involved as the MOF's function was primarily in the areas of controlling, enforcement, supervision, reconciliation, usage, distribution and storage of procurement for government departments. Examples of the information exhibited included; the range of purchases for products such as small items, viz., office stationeries to office equipment and even extended to huge assets such as vehicles, machineries and the most non-liquid asset, land and building. These guidelines also covered the provisions for the purchase of services. Examples of services purchased on behalf of the government included those received from consultants and advisors in the areas of engineering, technical, financial, legal and others<sup>22</sup>.

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<sup>22</sup> See "The Malaysian Public Procurement's Prevalent System and its Weaknesses", by Rohana Othman, Husein Zakaria, Norlaili Nordin, Zamzam Shahidan and Kamaruzaman Jusoff: Available at <http://thescipub.com/html/10.3844/ajebsp.2010.6.11>. [Retrieved on March 24<sup>th</sup> 2016].

6. Social economic factors governing in Malaysia – the Constitutional provisions<sup>23</sup>

The starting point of discussion in this part of the paper will revolve around the provisions of the Federal Constitution of Malaysia. The reason why a discussion of the Federal Constitution is required is because of a particular provision that has been the subject of much debates as to whether this provision does indeed allow for preferential treatment for a particular class of persons over other groups of persons, and whether such preferential treatment is against the spirit of the constitutional provision.

The clause in question is Article 153 of the Federal Constitution which reads as follows:

*“It shall be the responsibility of the Yang di-Pertuan Agong (the sovereign head of State) to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.”*

The second clause of Article 153 stipulates that the Yang di-Pertuan Agong shall ensure the reservation for Malays and since 1963, for natives of Borneo *“of such proportion as he may deem reasonable of positions in the public service...and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and...any permit or licence for the operation of any trade or business is required by federal law...”*

Clause 4 expressly states that: *“In exercising his functions under this Constitution and federal law...the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or of the continuance of any*

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<sup>23</sup> For this part of the discussion, the author is grateful to Associate Professor Dr Johan Sabaruddin, Dean, Faculty of Law, University of Malaya, for his valued comments and input on the constitutional provisions.

*scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.”<sup>24</sup>*

To understand the feelings of the Federal Constitution and its intended objectives, it is perhaps prudent at this juncture to examine further. We have in Malaysia what is known as the social contract which was made by the founding fathers of the country just after the country received independence from the British colonial rule in 1957.<sup>25</sup> That was when the Federal Constitution was drawn up and since Malaysia is made up of three main races: Malays, Chinese and Indians, and a small number of others, the social contract was drawn up to allow for the granting of citizenship to the non-*Bumiputera*<sup>26</sup> of Malaysia (especially the Malaysian Chinese and Indians). To bear in mind that the granting of the citizenship status to the other nationalities (Chinese and Indians) does not, in any way, take away the special rights and privileges accorded to the *Bumiputera* (Malays). Ironically, the social contract, according to a number of writers, has been criticised in that it has been used, by the ruling party, to swerve away from the noble ideologies, and instead is now being used defend the principle of *Ketuanan* (Malay supremacy). To delve into the details of this is outside the scope of this paper. However, suffice to note that the reclassification of the social contract i.e. towards defending Malay supremacy, may be seen in public procurement exercises<sup>27</sup>. This has caused much dissatisfaction as the main industry which is the construction industry decries that the procurement exercises are not transparent and thus the use of taxpayers monies may be used in a non-productive manner. However, it is provided in the Federal Constitution that annual audits are conducted by the

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<sup>24</sup> Kua Kia Soong, “Do Malays have special ‘rights’?”: Available at <http://www.suaram.net/?p=4397> [Retrieved on March 16<sup>th</sup>, 2016].

<sup>25</sup> However, nowhere in the Federal Constitution do the words “Social Contract” appear.

<sup>26</sup> “Sons of the soil”.

<sup>27</sup> Apart from lack of transparency in the award of contracts, the other complaints are that contracts are awarded to companies that do not have track record of successful projects, or do not have the special expertise to carry out the contracts awarded to completion.

Auditor-General's Department.<sup>28</sup> The annual audit brings faults and mismanagement to the forefront, but as to how much of it is actually taken into consideration in order to curb such malpractices is not made public. Some cases that have been highlighted as a result of the auditor-general's reports are examined in the next part of this paper.

7. The impact of the Auditor-General's report with regard to government projects that show a disregard for procurement especially in relation to transparency and accountability

#### **Auditor-General's Report 2014**

In brief, the following is an extract of the weaknesses discovered by the Auditor General's Report of 2014.<sup>29</sup> There were problems in relation to a hospital upgrading project. The contractor and relevant government officers were to be held responsible. Empty buildings in the US were renovated at a substantial cost by the Foreign Ministry. The Customs Department failed, on the basis of technical errors to collect taxes. On the other hand, however, the management of quarters by the Property Management Division of the PM's Office was satisfactory - in terms of selection of tenants as well as having achieved its objective of providing quarters for civil servants.

Generally, there were weaknesses such as work/procurement/service did not meet specifications/non-quality/unsuitable; unreasonable

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<sup>28</sup> Article 106 and 107 of the Federal Constitution and the Audit Act 1957 give the power to the Auditor-General to audit the Federal Government's Financial Statement, financial management, activities as well as management of Federal Government Companies and to submit his reports to the King. The report is then tabled before the House of Representatives. Pursuant to this, the Auditor-General conducts 4 types of audit: Attestation audit; Compliance audit; Performance audit and Government Companies Management Audit.

<sup>29</sup> Available at <http://www.thesundaily.my/news/1618074> [Retrieved on April 3<sup>rd</sup>, 2016].

delays; improper payment; wastages; weaknesses in Government's assets management and weaknesses in revenue collection. Such weaknesses were due to negligence in complying with rules/procedures; not meticulous in planning, defining scopes and tender specifications; lack of frequent and thorough supervision on the works of contractors/vendors/consultants; poor project management skills; lack of focus on the programme's/ activity's/project's outcome/impact and insufficient funds for assets' procurement/maintenance.

However, there were several aspects which requires corrective measures and improvements to be taken as it could affect the efficiency and effectiveness of the projects. Delays could be minimized and effective monitoring of works as they progressed could result in effective use of finances with less burden to taxpayers. Deficiencies should be identified in the planning stage and revised accordingly to ensure that extension of time cases relating to planning drawbacks would be minimized for government's interest. Contracts should be signed timeously in order to preserve the government's interest. Consultants should be appointed based on their qualification and track record to ensure that quality and efficiency of project implementation is preserved. There should be adequate monitoring on the performance of the consultants and actions should be taken when inefficiencies and negligent behaviour were identified. Drawings, operation and maintenance manuals should be given to the contractor according to time specifications.

In construction works, care should be taken to ensure that proper instrumentation and testing of equipment was carried out satisfactorily. Quality of work should be monitored adequately and corrective action on damages should be enforced during the Defects Liability Period. Once the projects are completed, maintenance was a key issue. Damages should be identified, especially if such happens in schools and public walkways as this would cause danger to the end users.

Generally, closer monitoring should be carried out on the maintenance of the landscape in areas which have been contracted out to contractors to ensure that the procuring entity gets best value for money from the payment made. If the contractor involved does not fulfill his responsibilities as per the contract provisions, firm action



such as imposing deductions, imposition of penalties and blacklisting the contractors should be made by the entity. For areas that are maintained by procuring entity, research/analysis should be carried out to establish the appropriate norms of productivity and optimal number of staff to carry out maintenance; and there should be adequate coordination established between all government departments in order to reduce misconduct by irresponsible third parties who damages public property and facilities. Firm action must be taken by the responsible Department to the respective parties so that repairs can be carried out. Action should be taken against government officers who neglected their duty to ensure contractor compliance on rules and regulations.

Another problem identified by the Auditor-General's report was the awarding of contracts to inexperienced companies, with no track record of building a particular type of project. It was discovered that the companies were appointed through direct negotiations and were given the fast-track by the Finance Ministry. When such is the case, then shoddy work that affected delivery of services in the particular building project which was a hospital resulted. There were four elevators costing RM2.03 million that are non-compliant to specifications, which caused difficulties in transporting ICU beds.

Negligence, mismanagement and ineffective working by the inexperienced contractors also led to many construction accidents, the most common one being the collapse of the Trengganu Stadium, which collapsed in June 2009 and again in February 2013. It was discovered that the reason for the collapse was negligence during construction. A second collapse was the second bridge in Penang, which again was due to negligence during construction. As observed by an expert:

*"The scaffolding must be able to withstand the superstructure and horizontal loads as well as the additional hydraulic pressure of fresh cement. It takes five hours for the concrete to harden before it can carry its own weight. Before that, it relies on the scaffolding to hold it in place." – Dr Mahyuddin Ramli, The Star Newspaper.*

8. Conclusion – The way forward for Malaysia – balancing the defining principles of the UNCITRAL together with the social economic factors – can we adopt the UNCITRAL principles without offending the social economic factors?

The discussion is clear in that there are inadequacies in the current procurement principles that are being used in Malaysia. However, a careful perusal of the UNCITRAL Model Law does also give us reason to go ahead with a more regulated regime of public procurement in that the prevailing social national interests are still recognised under the UNCITRAL Model Law provisions. There should not be any underlying fears that national companies and national suppliers will be sidelined. What we should be striving for is a regime that allows for value for money to be the fundamental foundation for procurement. Transparency in procurement will also be another milestone to achieve good value for taxpayers monies. Open competition will also allow all those involved in the industry to have a level playing field from where they are able to enjoy the benefits across the board. As such, in conclusion, it is recommended that to follow the UNCITRAL Model Law Procurement Rules will not in any way cause detriment to national goods and services. In fact, once the procurement regime boasts of transparency, competition and value for money, and practises integrity in procurement and monitoring of projects, investor confidence will boost the economy and this will in turn benefit the national players.

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